

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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JANINE WEST, parent and legal guardian on behalf of DAVID WEST,

Petitioner, *

V. *

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent. *

* * * * *

No. 99-585V
Special Master Christian J. Moran

Filed: July 10, 2007

UNPUBLISHED DECISION DISMISSING PETITION¹

On June 15, 2007, Janine West, on behalf of David West, filed a Motion for a Ruling on the Record. This motion is GRANTED. The Court finds that the information on the record does not show entitlement to an award under the Program. Petitioner's claim for compensation is hereby DENIED.

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

I. Procedural History

Janine West, David's mother, filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq.,² alleging that David received the hepatitis B vaccine on August 16, 1996, October 5, 1996, and April 11, 1997, and subsequently experienced adverse reactions to these inoculations. No medical records were filed with the petition. Medical records filed later indicate that David was diagnosed with juvenile rheumatoid arthritis.

By an order issued on April 27, 2000, the case was stayed at the request of the petitioner. The case was reassigned to the undersigned Special Master on February 8, 2006 and a status conference was held on March 29, 2006. No medical records had been filed by that time.

At the March 29, 2006 status conference, the court determined that the case should proceed and ordered Ms. West to file all available medical records.

On May 2, 2006, Ms. West submitted exhibits 1-3. These exhibits contain some of David's medical records. Along with the exhibits, Ms. West filed a status report indicating that she had consulted with counsel and agreed that the case may be very difficult to prove due to the time delay between the vaccinations and the onset of symptoms. She stated that she needed additional time to determine how to proceed.

On May 31, 2006, Ms. West filed a status report requesting an additional 60 days to determine how to proceed. On June 8, 2006, the court ordered that Ms. West file a status report by July 7, 2006.

² Although David reached the age of majority on June 19, 2004, no motion was ever filed to recaption the case with him as the named petitioner.

On July 6, 2006, Ms. West filed a motion for enlargement of time. Petitioner's counsel relayed that he had difficulty contacting petitioner, and asked for an additional 30 days to comply with the court's orders. On July 10, 2006, the court issued a new order setting August 7, 2006 as the new deadline for a status report.

On August 7, 2006, Ms. West filed a status report in which she indicated that she no longer wanted to pursue the claim and intended to file a motion for judgment on the record. Several months passed without a filing by Ms. West.

A status conference was held on January 25, 2006. During that call, Ms. West's counsel requested that the court give his client an additional 30 days to file an affidavit. The court obliged and issued an order that Ms. West provide an affidavit describing David's condition by February 26, 2007. No affidavit or further filings have since been received.

On May 16, 2007, this court issued an order to show cause why this case should not be dismissed for failure to prosecute. Ms. West was to respond by June 15, 2007. On June 15, 2007, Ms. West filed a motion for judgment on the record. In the motion, Ms. West acknowledged that she was unable to prove causation or find an expert to support her claim. Accordingly, Ms. West's motion is GRANTED and her petition is DENIED.

II. Factual History

The medical records in this matter are very sparse. Ms. West has filed exhibits 1-3, which consist of records from Dr. Rafael Rivas-Chicon, a rheumatologist; records from Dr. Richard Simon, an ophthalmologist; and records from Miami Children's Hospital. The records indicate a diagnosis of juvenile rheumatoid arthritis.

David West was born on June 19, 1996. In the petition, Ms. West alleges that David received the hepatitis B vaccinations on August 16, 1996, October 5, 1996, and April 11, 1997. The earliest medical records appear to be from March of 1999. Exhibit 1 at 23. The earliest diagnosis of arthritis is on March 8, 1999. Exhibit 1 at 24. The diagnosis appears to have been narrowed down to juvenile rheumatoid arthritis on April 5, 1999. Id. at 20.

As indicated above, since the filing of these three exhibits, Ms. West has made no additional filings with the court, nor has she responded to the court's orders. In particular, she has not filed an affidavit describing David's current condition as ordered by the court on January 25, 2007.

None of the medical records have indicated a relationship between the vaccine and David's condition. Nor has Ms. West presented a medical theory linking the causation of David's illness to the receipt of the hepatitis B vaccine. Furthermore, Ms. West has not submitted an affidavit as ordered by this court and has indicated through counsel that she does not intend to proceed with this case. Because of Ms. West's failure to prosecute the case and to present the court with a theory linking her vaccination to her injury, her petition is hereby DENIED.

III. Discussion

This case is deficient in two respects. First, Ms. West has not prosecuted the case diligently. Second, the existing record lacks the evidence necessary to support Ms. West's claim for compensation.

The Court has granted Ms. West several opportunities to file an affidavit and medical records in compliance with the court's orders. See orders dated May 5, 2006, June 8, 2006, July

10, 2006, January 25, 2007, and May 16, 2007 . Ms. West has not done so. When petitioners (or plaintiffs) fail to comply with Court orders to prosecute their cases, the Court may dismiss their cases. Sapharas v. Sec’y of Health & Human Servs, 35 Fed. Cl. 503 (1996); Tsekouras v. Sec’y of Health & Human Servs, 26 Cl. Ct. 439 (1992), aff’d, 991 F.2d 810 (Fed. Cir. 1993) (table); Vaccine Rule 21(c); see also Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1183 (Fed. Cir. 1990) (affirming dismissal of case for failure to prosecute for counsel’s failure to submit pre-trial memorandum); Adkins v. United States, 816 F.2d 1580, 1583 (Fed. Cir. 1987) (affirming dismissal of case for failure of party to respond to discovery requests).

In addition, to satisfy her burden of proving causation in fact, petitioner must offer "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.” Althen v. Sec’y of Health & Human Servs, 418 F. 3d 1274, 1278 (Fed. Cir. 2005).

A petitioner may not be given a Program award based solely on the petitioner’s claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. § 300aa-13(a)(1). In determining whether a petitioner is entitled to compensation, the special master shall consider all material contained in the record. 42 U.S.C. § 300aa-13(b)(1). This universe necessarily includes “any . . . conclusion, [or] medical judgment . . . which is contained in the record regarding . . . causation . . . of the petitioner’s illness.” 42 U.S.C. § 300aa-13(b)(1)(A).

By failing to submit a medical theory and proof of vaccination, Ms. West has not effectively established that David has an injury that is attributable to a vaccine. The medical

records do not support a conclusion and Ms. West has stated that she is unable to find an expert to support her claim. Thus, allowing Ms. West additional time to prosecute this case appears fruitless.

IV. CONCLUSION

For these reasons, petitioner's claim for compensation is hereby DENIED. In the absence of a motion for review, the Clerk of the Court shall enter judgment dismissing the petition.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master